**IN THE COURT OF APPEALS**

**FIRST APPELLATE DISTRICT OF OHIO**

**HAMILTON COUNTY, OHIO**

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| HILL COUNTRY LTD. | : | APPEAL NO. C-090624<br>TRIAL NO. A-0806710 |
| and | : | *JUDGMENT ENTRY.* |
| TONI KIRKNER, | : | |
| Plaintiffs-Appellants, | : | |
| vs. | : | |
| CITY OF NORWOOD BOARD OF ZONING APPEALS, | : | |
| Defendant-Appellee. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiffs-appellants Hill Country Ltd. and Toni Kirkner appeal from the trial court's entry affirming a decision by the Norwood Board of Zoning Appeals that denied Hill Country Ltd.'s application for a conditional-use permit for an office project or, in the alternative, for an area variance for a single-family residence for the property located at 4320 Franklin Avenue in the city of Norwood.

The record reveals that Hill Country Ltd., a Kentucky limited partnership consisting of Kirkner, Michael Dalton, and the Thomas Michael Agency, LLC, purchased the property at a sheriff's sale. The property consists of a 2,000-square-foot lot that was carved from a platted lot in the 1920s, with a single-story building of approximately the same square footage. The property had previously been operated

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

as a neighborhood grocery, but had remained vacant since 2000. In May 2006, the city of Norwood declared the property a public nuisance and ordered the demolition of the building on it.

Sometime after purchasing the property, Hill Country Ltd. filed an application with the Norwood Board of Zoning Appeals requesting a conditional-use permit for an office project or, in the alternative, an area variance for a single-family residence. The board held a public hearing. Kirkner presented Hill Country's proposal to turn the building into a "green" office building or, in the alternative, to use the property for a single-family residence. She acknowledged that Hill Country had made a "leap of faith" and had purchased the property sight-unseen with knowledge of the demolition order, but she stated that Hill Country believed it would be able to develop the property based upon its experience with similar properties in the city of Cincinnati.

Norwood Building Commissioner, Gerry Stoker, then spoke. He recommended that the board deny the application. He stated that the property was zoned R-2, a "one family and two family residence district," and therefore did not allow office use as a conditional or a permitted use. He further explained that the only way Hill Country Ltd. could use the property for an office building was if it were granted a "use variance," but that the zoning code prohibited the board from granting a "use variance" in this instance. Stoker also recommended that the board deny the variance application so that the property could be used for a single-family residence because Hill Country's Ltd.'s proposal would require a 100% variance from the front-setback requirement, a 60% variance from the side-yard requirements, a 65% variance from the minimum-lot standards, and a 100% variance from the parking requirements. Stoker also noted the building that was still on the property was five feet from a single-family home, was in significant disrepair, and had been under a demolition order when Hill Country Ltd. purchased it.

Several neighbors also spoke against the proposal. They stated that the project would be a detriment to the neighborhood. Collectively, they spoke about the dilapidated state of the building, the small size of the property, and the lack of yard area and parking. They raised concerns that the building could not be developed into anything but a small single-family residence, and that such use would place an undue burden on the surrounding neighborhood because additional parked cars would exacerbate an already inadequate on-street parking situation.

The board ultimately denied Hill Country Ltd.'s application. While the board sympathized with Hill Country Ltd.'s plans to rehabilitate the property, it noted that the partnership had purchased the property sight-unseen, with knowledge of the demolition order, and that the proposed uses would require unduly extensive variances to comply with the zoning code.

Hill Country Ltd. and Kirkner appealed the board's decision to the common pleas court. The trial court dismissed Hill County Ltd. from the appeal because it was not represented by legal counsel, but it permitted Kirkner to proceed pro se and to present additional evidence at a hearing. At the hearing, Kirkner examined thirteen witnesses, many of whom had spoken at the public hearing before the board, and introduced some photographs into evidence. After hearing the evidence and reviewing the transcript of the evidence before the board, the trial court affirmed the board's decision. This appeal followed, with Kirkner raising three assignments of error for our review.

We begin by addressing her third assignment of error, in which she argues that the trial court erred in dismissing Hill County Ltd. as a party to the administrative appeal. She contends that, as the sole partner in the partnership, she held the sole interest in the property and therefore, had the right to act on behalf of the partnership under Kentucky law. She further argues that, under Civ.R. 17, the

trial court should have permitted her the opportunity to seek counsel before it dismissed the partnership from the appeal.

We begin our analysis by noting that Civ.R. 17 does not apply because the trial court did not dismiss Hill Country Ltd. on the basis that it was not the "real party in interest." Rather, the trial court dismissed the partnership because it had no legal representation and could not be represented by Kirkner, a nonattorney who was but one of three members of the partnership. The other two members of the partnership were not parties to the administrative appeal.

Although the trial court dismissed Hill Country Ltd. from the appeal, it permitted Kirkner to proceed pro se despite the Board's objection that she lacked standing because she was not the "real party in interest."[2] Thus, we fail to see how Kirkner herself was prejudiced by the trial court's actions in dismissing Hill Country Ltd. from the administrative appeal. As a result, we overrule her third assignment of error.

We further note that while Kirkner has purported to file an appeal on behalf of Hill County Ltd., such an appeal is untimely. Once the trial court dismissed Hill Country Ltd. from the proceedings, the partnership had 30 days from the dismissal to obtain counsel and to appeal to this court. It did not do so. As a result, it is not a party to this appeal.

In her first assignment of error, Kirkner argues that the trial court applied the wrong standard of review. In her second assignment of error, she argues that the trial court failed to consider and weigh all the evidence before it. Because these assignments of error are related, we address them together.

When reviewing an administrative appeal under R.C. 2506.04, "[t]he common pleas court considers the 'whole record' including any new or additional

[2] The board has not challenged this ruling.

evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence."[3] This court's standard of review, however, is much more limited. We must affirm the decision of the common pleas court unless we conclude, as a matter of law, that the decision "is not supported by a preponderance of reliable, probative and substantial evidence."[4] In our review, we cannot substitute our judgment for that of the administrative agency or the common pleas court.[5]

Kirkner argues that the trial court failed to consider all the evidence before it, and therefore, that it could not have applied the appropriate standard of review. She points to selected statements that the trial court made both during and after the hearing as support for her argument. But it is axiomatic that a trial court "speaks only through its journal entries."[6]

In its judgment entry affirming the board's decision, the trial court stated that it had granted Kirkner's motion to hear additional evidence pursuant to R.C. 2506.03; that the parties had produced such evidence at a July 20, 2009, hearing, and that "Ms. Kirkner had the burden of showing that the Board of Zoning Appeal's [decision] was not supported by reliable, probative, and substantial evidence." The court's entry further stated that "[i]n reviewing the evidence submitted at the 7/20/09 hearing and provided in the filing of the transcript, this Court finds that Ms. Kirkner did not meet this burden. Therefore, the decision of [the] Norwood Board of Zoning Appeals is affirmed."

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[3] See *Henley v. Youngstown Bd. of Zoning Appeals,* 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433.
[4] See *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848.
[5] See *Henley,* supra, at 147, quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264.
[6] *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163, 1995-Ohio-278, 656 N.E.2d 1288.

While somewhat inartful, the trial court's entry clearly demonstrates not only that it applied the correct standard of review, but that it also considered the totality of the evidence before it. As a result, we overrule Kirkner's first and second assignments of error. Having found none of Kirkner's assignments of error meritorious, we, therefore, affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J. HENDON** and **DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on May 26, 2010

per order of the Court _____.

Presiding Judge